Supreme Court, U.S.
FILED
APR 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1063

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Petitioner,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JOINT APPENDIX

MILLER, DOLLARHIDE, DAWSON & SHAW
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Petition for Certiorari Filed December 26, 1989
Certiorari Granted February 26, 1990

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The following docket entries, orders, letter and memorandum opinion have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Docket Entries 1-179 ..... F-1

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The following pleadings have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Brief for Respondent:

Objection to Defendant's Suggested Findings of Fact and Conclusions of Law A-1

FirsTier's suggested Findings of Fact and Conclusions of Law B-1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.
Plaintiff,

vs.

INVESTORS MORTGAGE CO.
Defendant.

CAUSE

28 USC 1332: breach of insurance contract – tort bad faith

ATTORNEYS

PLAINTIFF:
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405/236-8541

DEFENDANT:
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Okla. City, OK 73102
405/235-0123 (1)

. . . .

(Docket Entries 1-178 omitted from this printing because they appear at pages F-2 through F-16 of the appendix to the Petition for Certiorari)

DATE	N.R.	PROCEEDINGS
04-24-89	179	ENTRY of Appearance by Gregory F. Pilcher, cnsl for dft -w/s (ap)
04-25-89	180	NOTICE of Appeal by Plf, FirsTier Mortgage Co. fm Ct's Ord & Judg & Memo Opinion ent 3-3-89 w/s -jda
04-25-89	181	CLERK'S ltr re: serv of notice of appeal, w/cpy ltr & dkt sht as Prelim record to CCA & cnsl -jda #89-6145
04-25-89	—	RECEIVED $105.00 filing & dkt fees on appeal. #79758 -jda
04-28-89	182	NOTICE of Appeal by Investors Mortgage Insurance Co fm ord ent 4-24-89 w/s -jda
04-28-89	—	RECEIVED $105.00 filing & dktg fees on appeal. #79845 -jda
05-01-89	183	CLERK'S ltr re: serv of Notice of appeal, w/cpy ltr & dkt sht as prelim record to CCA & cnsl -jda #89-6150
05-10-89	184	NOTICE of transc ord (Pilcher) (No TR necessary) cc: CCA & cnsl -sa
05-10-89	185	SUPERSEDEAS Bond in amt of $65,221.40 fm The St. Paul Fire & Marine Ins Co, as surety pndg appeal fm Ord ent 4-6-89 (BOHANON) (ap)
05-22-89	186	NOTICE of Transc ord form (Dawson, Dansby) (Mueck, C.S.R.) (E.C.D.- 7-22-89) -jda
06-14-89		TRANSCRIPT Of Hrg 1-26-89, Hilton, CSR, 1 vol, -sa
06-15-89	187	CLERK'S ltr to CCA & cnsl advise transc rec'd, 1 vol, Hilton, CSR -sa

DATE	N.R.	PROCEEDINGS
07-24-89	—	TRANSCRIPT of Proceed had on April 6, 1989, Muecke, CSR-1 vol -jda
07-25-89	188	CLERK'S ltr advising CCA & cnsl TR rec'd, 1 vol, Muecke, CSR -jda
09-29-89	189	CCA'S cert cpy of ord re consideration of an ord of the Ct challenging appellate juris; it is ord appeal in #89-6042 is dism for lack of juris; oral announce by D.C. on 1-26-89 was not a final decision w/i the mean of 28 U.S.C. S1291; mtn to dism file in #89-6145 is denied; (more fully set out) (Moore, Baldock, & Ebel) #89-6042 -sa
12-29-89	190	CCA'S ord record on appeal due 1-5-90 -eab
01-5-90	191	CLERK'S ltr transm record on appeal to CCA, 4 vol, w/cpy ltr & dkt sheet as index to cnsl -eab

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., A/K/A REALBANC, INC.,
Plaintiff,

vs.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

AMENDED COMPLAINT

I. JURISDICTION — Diversity:

Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Nebraska, with its principal place of business in Omaha, Nebraska. Defendant is a corporation organized and existing under the laws of a state other than Nebraska, with its principal place of business in Boston, Massachusetts. Defendant is an insurance company, regulated by, and authorized to issue policies of insurance in, the State of Oklahoma. The amount in controversy, exclusive of costs and interest, exceeds the sum of $10,000.00.

II. CONTRACTUAL DUTY — Insurance Policies Issued:

In the late 1982 and early 1983 time-frame, Plaintiff made first mortgage real estate loans to various individuals in Beckham County, Oklahoma, including those listed below. To insure and secure itself against loss caused by reason of default by the borrowers in payment upon these loans, Plaintiff purchased policies of insurance from Defendant. Under the terms of these policies of insurance, Defendant promised to pay to Plaintiff certain percentages of

losses sustained by reason of the default by the borrower in payments upon the loans. The specific insurance policies and borrowers as of 10 March 87 are as follows:

Policy #	Name/Address
456987	Largent, Parke & Glenda 107 Cripple Creek Lane Elk City, Oklahoma
456988	Largent, Parke & Glenda 105 Cripple Creek Lane Elk City, Oklahoma
457066	Statt, Henry and Janice 109 Cripple Creek Lane Elk City, Oklahoma
457078	Busking, Larry E. 103 Cripple Creek Lane Elk City, Oklahoma
457225	Busking, Keith & Paula 123 Cripple Creek Lane Elk City, Oklahoma
457246	Armstrong, Don 125 Cripple Creek Lane Elk City, Oklahoma
457247	Armstrong, Don 121 Cripple Creek Lane Elk City, Oklahoma
457224	Wolfe, Charles 111 Cripple Creek Lane Elk City, Oklahoma

III. BREACH — Refusal to Pay Claims:

Plaintiff has suffered, and will continue to suffer, losses caused by reason of defaults by the borrowers in payments of the above-referenced loans. Plaintiff has made claim upon Defendant and has complied

with all conditions precedent not waived or excused by Defendant. Defendant unreasonably refuses to pay the claims or to honor the commitments of its insurance policies which it issued, and has stated its intention to not pay other claims when made.

IV. DAMAGES – Approximately $169,000.00 Plus:

As of March 10, 1987, Plaintiff had suffered damages of approximately $149,000.00. An additional $20,000.00 (approx.) has been suffered because of Defendant's breach on the Wolfe policy. These sums will continue to increase daily because of additional interest. Plaintiff's consequential damages have not yet been determined.

V. BAD FAITH – Punitive Damages:

Defendant owed Plaintiff the duties of good faith and fair dealing in the processing and payment of claims. Defendant has breached these duties by willfully, maliciously, intentionally and in bad faith refusing to pay Plaintiff's claims without just cause, thereby depriving Plaintiff of the security and protection for which it paid. Defendant has shown an attitude of indifference to, and reckless disregard of, the consequences of its breaches of duties to Plaintiff and Plaintiff's rights. Defendant should be punished by assessing punitive damages in an amount sufficient to make an example of Defendant and to insure that Defendant, and others similarly situated, do not repeat this conduct, and to punish the defendant for its past conduct.

VI. RELIEF – Money Judgment:

Plaintiff requests a money judgment against Defendant in the approximate amount of $169,000.00, continuing interest-related loss, interest, costs and attorney fees.

FIRSTIER MORTGAGE COMPANY

By _____

Jack S. Dawson #2235
Miller, Dollarhide, Dawson & Shaw
Attorneys for Plaintiff
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

JURY TRIAL DEMANDED
ATTORNEY'S LIEN CLAIMED

. . . .

(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ANSWER

Dated May 11, 1987
(Caption Omitted in Printing)

COMES NOW the Defendant, Investors Mortgage Insurance Company, a/k/a Investors Mortgage Insurance Co., an Illinois corporation, and for its Answer to the Plaintiff's Amended Complaint filed herein on April 17, 1987, alleges and states as follows:

1. Defendant is without sufficient knowledge and information to admit or deny the allegations of paragraph 1 of the Amended Complaint, and, therefore, denies the same and demands strict proof thereof, except that the Defendant does not deny that Defendant is a corporation organized and existing under the laws of a state other than Nebraska, with its principal place of business in Boston, Masssachusetts, and that Defendant is an insurance company, regulated by, and authorized to issue policies of insurance in, the State of Oklahoma.

2. Defendant is without sufficient knowledge and information to admit or deny the allegations of paragraph 2 of the Amended Complaint, and, therefore, denies the same and demands strict proof thereof, except that the Defendant does not deny that the Defendant issued certain insurance policies in favor of the Realbanc, Inc. as the insured lender, which insurance policies and borrowers are generally described as follows:

Policy #	Name/Address
456987	Largent, Parke & Glenda 107 Cripple Creek Lane Elk City, Oklahoma

Policy #	Name/Address
456988	Largent, Parke & Glenda 105 Cripple Creek Lane Elk City, Oklahoma
457066	Statt, Henry and Janice 109 Cripple Creek Lane Elk City, Oklahoma
457078	Busking, Larry E. 103 Cripple Creek Lane Elk City, Oklahoma
457225	Busking, Keith & Paula 123 Cripple Creek Lane Elk City, Oklahoma
457246	Armstrong, Don 125 Cripple Creek Lane Elk City, Oklahoma
457247	Armstrong, Don 121 Cripple Creek Lane Elk City, Oklahoma
457224	Wolfe, Charles 111 Cripple Creek Lane Elk City, Oklahoma

3. Defendant denies the allegations contained in paragraph 3 of the Amended Complaint.

4. Defendant is without sufficient knowledge and information to admit or deny the allegations of paragraph 4 of the Amended Complaint, and, therefore, denies the same and demands strict proof thereof, except that the Defendant specifically denies any alleged anticipatory breach of contract on the Wolfe and Statt policies.

5. Defendant denies the allegations contained in paragraph 5 of the Amended Complaint.

6. Defendant denies the allegations contained in paragraph 6 of the Amended Complaint.

AFFIRMATIVE DEFENSES

7. The Plaintiff's claims are barred by accord and satisfaction.

8. The Plaintiff's claims are barred and the Plaintiffs have suffered no damages as a result of its own contributory negligence.

9. The Plaintiff is estopped by its own failure to mitigate its alleged damages to seek recovery from the Defendant.

10. As a result of a total failure of consideration, the Defendant has no liability to the Plaintiff on the insurance policies in question.

11. That the mortgage loans which were insured by the said insurance policies were obtained by fraud and misrepresentations by the said borrowers, and as a result the Defendant has no liability to the Plaintiff on the insurance policies in question.

12. That because of illegality, the Defendant has no liability to the Plaintiff on the insurance policies in question.

13. That because of waiver, the Defendant has no liability to the Plaintiff on the insurance policies in question.

14. That because the Plaintiff did not comply with all the terms and provisions of the insurance policies in question, the Defendant has no liability to the Plaintiff on the insurance polices in question.

15. That the Plaintiff was negligent in underwriting the mortgage loans covered by said insurance policies, and any alleged damages sustained by Plaintiff were a direct result of the Plaintiff's own negligence.

16. That the Plaintiff owed the duty of good faith and fair dealing in submitting the mortgage loans to be insured by the Defendant, and any alleged damages sustained by the Plaintiff are a result of the breach of Plaintiff's own duty of good faith and fair dealing.

WHEREFORE, having fully answered the Defendant prays that the Plaintiff take nothing by this action, and that the Amended Complaint be dismissed with prejudice and that judgment be entered for the Defendant, and that the Defendant be awarded attorney's fees, costs, and such other relief as this Court may deem just and proper.

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Eric S. Gray
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1601 Northwest Expressway
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(405) 842-1945

Attorneys for Defendant,
INVESTORS MORTGAGE
INSURANCE CO.

. . . .

(Certificate of Mailing Omitted in Printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE LUTHER L. BOHANON
UNITED STATES DISTRICT JUDGE

Dated January 26, 1989
(Caption Omitted in Printing)

APPEARANCES:

For the Plaintiff: JACK DAWSON and
JANICE DANSBY
Attorneys at Law
Colcord Building
Oklahoma City, OK

For the Defendant: ERIC GRAY and
GREG PILCHER
Attorneys at Law
2900 First Oklahoma Tower
Oklahoma City, OK

Court Reporter: Lynn L. Hilton
3011-C U.S. Courthouse
Oklahoma City, OK 73102

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

THE COURT: The Court has for consideration [p. 3] this morning the case of Firstier Mortgage versus Investors Mortgage Insurance Company.

Jack Dawson, you represent the Plaintiff?

MR. DAWSON: Yes, Your Honor.

THE COURT: Mr. Roberts?

MR. GRAY: Mr. Roberts is not here today, Your Honor. Eric Gray and Greg Pilcher here on behalf of Investors.

THE COURT: Do you have a motion?

MR. GRAY: Yes, Your Honor, it is my Motion for Summary Judgment.

THE COURT: Do you want to be heard on it?

MR. GRAY: Yes.

THE COURT: I might say that the file in this case has become very voluminous. The parties have filed and refiled and filed and refiled papers and mortgages and I have read everything. I can't say that I understand everything perfectly, but I think I understand the problem is whether or not the insurance issued by Investors Mortgage Insurance Company is insurance that carries liability or whether it does not. Is that the question?

MR. GRAY: Yes, basically, Your Honor, whether my client is liable under the policies or is exonerated from those policies based on an Oklahoma Statute under Title 36, [p. 4] Section 3609.

THE COURT: Was there eight policies issued?

MR. GRAY: Yes, eight policies.

THE COURT: All right. The Court will hear you on it.

MR. GRAY: I realize that there is a mountain of briefs in this case, Your Honor, but in essence it is a very simple case. Plaintiff is in the business of making loans; Defendant is in the business of insuring losses on default on those types of loans.

The premium on insurance of this type is based on the risk insured, obviously. In the present case, there were eight mortgage loans that were made on duplex properties in Elk City, Oklahoma.

All of the properties were owned by the same man, a man by the name of Bill Tucker. Mr. Tucker sought to sell those properties. He found buyers. It is our contention that they were all straw buyers. It is admitted, by the Plaintiff at least, that five of them were what I call straw buyers. They didn't have any money of their own invested in the property.

There is some dispute over three of those properties, but I will address that in just a moment.

In connection with each of the mortgage loans, the Plaintiff sought insurance from my client, Investors Mortgage [p. 5] Insurance Company. My client reviewed the documentation that was submitted to them, which is set forth in the briefs herein, but essentially it is the loan application, all of the documents that go into making a loan.

Based upon those documents, my client issued commitment/policy to the Plaintiff on each of the loans. Those commitment/policies are in Exhibit B in my original Motion for Summary Judgment.

IMI, my client, thought they were insuring loans where the sales price was $94,000, where the appraised value was $94,000 and where the loan amount was 80 percent of the value of the property or approximately $75,200. That's what they thought.

In reality, that was not true. The truth was that there was no money involved in these transactions other than the loan amounts and the true loan to value ratio was 100 percent, because in essence the properties were being sold for the loan amounts.

These borrowers, there are six total borrowers, had no money of their own at stake, they made no down payment, they had no earnest money on deposit with any realtor.

The risk to my client when the loan changes from an 80 percent loan to 100 percent loan increases astronomically.

The relevant statutory framework that we need to look at, and the Court has previously granted partial summary [p. 6] judgment in this matter with respect to the applicability of Section 3609 of Title 36 of the Oklahoma Statutes.

That statute basically provides that once the Court finds that a misrepresentation, omission, concealment of fact or incorrect statement has been made, there is a second-prong to the test and that is in order to avoid liability under the policy, you must satisfy one of three elements; either the misrepresentation, incorrect statement, concealment of fact or omission must be fraudulent or must be material to the acceptance of the risk or the hazard assumed or the insurer in good faith would not have issued the policy had the true facts been known.

It has been contended by the Plaintiff that they were innocent in this transaction, that they had no knowledge that these borrowers weren't really making the down payments.

The statute provides that the representations made by or in behalf of the insured are sufficient to void the policy if they meet the terms of the statute.

The borrowers were making statements on behalf of Firstier, there's no question about that from the documents that are submitted to you. The affidavit of purchaser and vendor which had to be submitted at the time the policies were issued specifically says that to induce the mortgage insurer to insure these loans, you are representing that these facts are true. Well, they weren't true.

Even aside from that, the policies of insurance on [p. 7] their face state that there is to be a loan to value ratio of 80 percent. That was not true in this case.

The question becomes whether the loan to value ratio is material to the risk or in good faith IMI, my client, would not have issued these policies. We don't have to show that Firstier, the Plaintiff in this matter, knew about the fraud that was being perpetrated by these borrowers and by the seller.

If the Legislature had intended for knowledge to be a prerequisite, they would have left it with one alternative – fraudulent. But they didn't do that, they

left it in the disjunctive. It can be fraudulent or it can be material to the risk or in good faith the insurer wouldn't have issued the policy. Any one of those three will void the policy.

There are some cases that are nearly directly on point. Particularly one, *United Guaranty v. Pioneer,* which is cited in the briefs in this matter. It is out of the Southern District of Florida. Essentially in that case the borrowers had misrepresented their income. But Florida had at that time an identical statute with the Oklahoma statute and the Florida Court gave judgment for the insurer.

In terms of meeting the materiality test, there is a case out of the Ninth Circuit, a 1987 case, *Verex v. John* [p. 8] *Hanson.* That case basically describes mortgage guaranty insurance. In paraphrasing it, it basically says there's very few things more material to mortgage insurance than the loan to value ratio. It measures the risk of the insured.

The most recent case interpreting Section 3609 under Oklahoma law is a case called *Coptin v. Shelter Insurance.* It is an Oklahoma Court of Appeals case. That case dealt with a situation where there was a theft loss and the insured had failed to disclose to the insurer that its property had previously had a fire loss several years prior or that the property was for sale at the time of obtaining the insurance.

The Court of Appeals in reversing a jury verdict for the insured basically interpreted Section 3609 and held that even innocent misrepresentations would be sufficient to void a policy of insurance under Section 3609.

I had told the Court that I would come back to those three policies where there is some dispute. The policies where there is some dispute were taken out by a man by the name of Charles Wolfus and a couple

by the name of Park and Glenda Largent. The Largents bought two of these properties and Mr. Wolfus purportedly bought one.

Each of these persons has testified under oath that they — well, Mr. Largent and Mrs. Largent testified they assumed they made the down payments, but they didn't know, didn't remember. Mr. Wolfus testified without a doubt he took [p. 9] a cashier's check to the closing payable to American First Abstract Company.

I think that the record will reflect that these statements are absolutely false. The Largents, based upon their financial position at the time and the source of their down payment, could not have possibly purchased two of these properties.

The Largents' source of down payment or settlement monies for one of the properties was to be from the sale of some other property that they had.

That property was shown as being sold on a settlement statement, but two days later the property was deeded back to the Largents and they therefore had no funds from the sale of that property to make the down payments in this case. Their other liquid funds were simply not sufficient.

Mr. Wolfus as well says that he gave a cashier's check to American First Abstract. Well, we subpoenaed the records of Mr. Bill Tucker, the seller in this case, from his bank. The bank records show eight checks written on Mr. Tucker's personal account; some of them, particularly in the case of the Largents', with the notation "Largents" at the bottom of them, in the exact amounts needed to close the loans at American First.

The truth is Mr. Tucker made the down payments. It [p. 10] was a wash to him. He put the money in, he got the money back, because he was the seller. The checks are written on the exact days of closing. Not

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all eight loans closed on the same day, they were over a period of time. But each check was written on the exact day that closing was to occur on one of the loans. It was written in the exact amount of the amount necessary, down to the penny, the amount necessary to pay under the settlement statement. They were all payable to American First Abstract in cash by American First Abstract.

There has been briefing in this case on the issue of the knowledge of the agent, American First, being imputed to Plaintiff Firstier.

I can address that if the Court wishes, but we do not contend or believe that the issue of Firstier's knowledge is in any way necessarily relevant. We have met the terms of the statute otherwise, but even if knowledge is relevant, we believe that the knowledge of that agent, American First Abstract in taking those eight checks from the seller, having no buyer with any money there giving it a check to American First should be imputed to Firstier since American First could do nothing but act for Firstier at that closing. It was an escrow agent. It took the money of Firstier, it took the instructions of Firstier as to how to disburse that money and when to disburse it and took on the responsibility of seeing that all of the documents were properly filed and executed. [p. 11]

There is one additional matter and that is there are two causes of action by Firstier in this matter. The first cause of action is on the eight loans. The second is a bad faith claim.

We would ask that if the Court grants summary judgment, that the Court grant summary judgment on the bad faith claim as well. My client cannot be in bad faith if the underlying policies are void. Thank you.

THE COURT: Mr. Dawson.

MR. DAWSON: If it please the Court, we have not addressed these bad faith issues in any of the briefs

at all. We could, I suppose, file another mountain of briefs on that if necessary, but I don't think so. I won't speak to that issue.

These two parties before this Court were at one time, and we say still are, risk partners. Those are words that were chosen by the insurance company. They told us, "We are going to be your risk partners." They chose those words.

Both of us are going to take a risk on the reliability of borrowers, people who are going to borrow money from my client. My client is going to loan 100 percent of the money. We are going to, in addition, pay them some premium and they are going to help us out to the extent of 20 percent of our loss if the buyers aren't reliable. So we are really out there. [p. 12]

What we do — there is no application — what we do is every bit of the documentation that we have gathered in order to make our decision as to whether to loan these people money, we take all of those documents and give them to the insurance company for their review.

We have the affidavit in this case, we filed it, of Mack Martin who worked for the company at that time. He says, I'll paraphrase and quote part, "I and my underwriters independently decide whether to insure the lender." They make their own decision based upon these documents. They are required to examine all documentation furnished by lender and make their own independent determination to quote, "Share the risk." The reason he puts that in quotes is because that's the insurance company's language, "Share the risk".

Now we made no misrepresentation to IMI. We made no representation at all. What the insurance company wants to say is that the false statements of these borrowers who we both are worried about, they were false. Well, those statements weren't made on

behalf of the lender. They were made to the lender to make us do something, make us loan 100 percent of the money.

The affidavit that opposing counsel talks about is an affidavit prepared by the insurance company and the borrowers make those statements directly to the insurance company. They are not made on my behalf, on behalf of [p. 13] Firstier Insurance Company, nothing is.

We have the Brunson case which we have cited in our brief, *Brunson v. Midwestern Life Insurance Company*. It says that a misrepresentation in insurance is a statement which the insured – that would be Firstier – which the insured states with the knowledge that it is untrue and with an intent to deceive. That's what they are going to have to prove my client did; that we knew a statement we made was wrong and we meant to deceive them or they can prove that we made a statement positively without knowing whether it was true or not.

If they can prove either one of those things, then we have made a misrepresentation under this 1976 case from the Oklahoma Supreme Court.

No statement that we made was untrue at all. Particularly we made no statement that we knew anything was positively true. What we say is, what they have us to say and the only representation we make at this time back in 1982 was that the statements made in the affidavit, the affidavit being made by the lender, to the best of our knowledge – and that's the words which IMI carved out for us to say, "To the best of our knowledge, those statements are true and correct."

That is true. At that point those statements were true and correct to the best of the knowledge of Firstier or they wouldn't be loaning 100 percent, they wouldn't be loaning [p. 14] 90 or $80,000 or whatever it is.

That's the way it was. That's all they asked us to tell them at that time. To the best of our knowledge, these statements are true. There's not a scintilla of evidence that Firstier had any idea that anything was going on at the time it was going on.

Now in 1984, after this, the insurance company changed and if – this is the point – if we had signed-on in '84, then we wouldn't be here today. There would be no case at all, there would be none, because later, before we made our claim but after we got our insurance policy, they changed. Then we would have to agree that the warranties – I'm quoting – "The warranties, representations and statements made herein and the documents, forms and other written matter submitted in the process of obtaining this commitment, whether made by the insured, the borrower or any of the parties shall be deemed warranties, representations and statements of the insured and which shall be deemed material for purposes . . ." and so forth.

After 1984, lenders had to agree that any statement made by the borrower was their statement. But before 1984, they didn't make that. That is the pivotol point on this case. Are the statements made by the borrowers our statements? No. Are they made on our behalf? No. They were made to us and they were made directly to IMI, but not by us [p. 15] or on our behalf.

This case is like the fellow who has a house and he wants to insure it against termites. He tells the insurance company, "I don't think I have termites. You come look at my house." They go look at the house and it turns up they don't think he does and they issue the policy but later they determine all the time he had termites.

Or a health insurance policy where the man says, "I think I'm in good health" and later it is determined that he had some kind of disease or something.

There is a case just like that. It is the Whitlack case, a Oklahoma case, 1968, *Whitlack v. John Hancock*. This fellow knew that he had shortness of breath and chest pain, knew that he had high blood pressure, but he made an application saying he was in sound health. He later died two months after he got the insurance policy of a coronary thrombosis.

The trial Court ruled against the widow. But the Supreme Court said, "No, because the rule" – I'm quoting – "The rule consistently applied by this Court in a multitude of decisions is that the question of falsity of statements in an application for life insurance and the applicant's intent in making such statements are questions for determination by the jury."

Whether the applicant intended to deceive is a [p. 16] question for determination by the jury, says the Whitlack case. That was a health and accident or life insurance case like I was talking about.

IMI told us all the time that after we make our review, our independent review of these documents and after we issue this policy, we are going to come around and spot-check. If we find that we have been deceived, do you know what we are going to do? Nothing. We are not going to cancel this policy if we find out the borrower or the appraiser has deceived you and us. That's in their manual.

Their policy is different now, but back when we came on board with them, their policy – and we have supplied this with our materials – says that "Negative review findings in no way affect the validity of the commitment or policy of insurance which has been issued."

If they review these loans and find bad acts, that's just a service that they will prepare for us. Frequent and significant variations will cause IMI to contact the lender to determine the cause of the discrepancies and try to help identify the problem and so forth.

On appraisals, on spot-checking these appraisals, after the policy is issued, if they think something is wrong, they will engage a qualified, independent appraiser to prepare a report on fair market value of the property and if they find chronic problems with individual fee appraisers, it will share [p. 17] that knowledge with lenders as a part of IMI's risk partnership with the lender.

In other words, they say we are going to spot-check all of these loans. If we find out the appraisers are phony or if we find out the borrowers are crooked, we are going to tell the lender. We are going to share that knowledge with you as a part of our risk partnership with you. We are not going to cancel the policy because of it, because they couldn't at that time. That wasn't their policy then. They have got new owners and they have got new policies now.

The affidavit of Mack Martin who worked for them at the time, the vice president in this region, said that he knew of no policy that had ever been canceled because of these reviews after the policies were issued. It had never happened before. Well, that changed. But it changed after this policy was issued, Your Honor.

That's the important part of this lawsuit. Again I'll tell you, admit, that if we had taken out these policies in 1984 after the policies changed, we wouldn't be here. This lawsuit wouldn't have been filed. We couldn't have filed it. Before then we could have. It was a different contract we had.

Counsel talked a little bit at the end about the agent, American First. In this case we have filed, when they brought up that issue late in the case, we got an affidavit [p. 18] and went down to American First, went through the situation with them and we have an American First affidavit that's filed in the case.

American First says, We are not the agent of Firstier here. We are a stakeholder and that's all we are. We have no knowledge of anything that was done wrong anyway. We don't have any knowledge that anything was done wrong. Our files are perfectly in order. We don't have any knowledge.

I don't see the relevance of even bringing up the closer in this case under the facts in this case.

Thank you, Your Honor.

THE COURT: Yes.

MR. GRAY: Brief rebuttal, Your Honor.

Counsel discussed the contract between the parties. The contract between the parties is contained in the commitment policy. Briefly I would like to tell or read to the Court what that contract says.

It says, "In consideration of the premium paid by the insured lender and the representations made by the insured lender below and in the application submitted, Investors Mortgage Insurance Company agrees to pay insured lender subject to the terms and conditions of this policy any loss sustained by reason of the default by the borrower in payments upon the loan identified as follows." Then they identify the loan.

The loan is identified as having a sales price of [p. 19] $94,000 and an appraised value of $94,000, a loan to value ratio of 80 percent.

At the bottom of the contract between the parties, it states, "Representations: The insured lender hereby represents that the loan transaction designated above has been closed, the loan is not in default. Any special conditions set forth herein have been satisfied by the buyer/seller affidavit that we made reference to previously and other necessary documents have been forwarded to the company and that the appropriate premium has been paid."

That's the contract between the parties. These representations are the representations of Firstier. But even if they are not, they are the representations made by borrowers on behalf of Firstier.

It was stated that there's not a scintilla of evidence that Firstier knew. Obviously Investors Mortgage Insurance disputes that fact.

I won't dwell on this, Your Honor, but the loan officer who took the applications for these loans was the same individual. Some of the borrowers testified that they never personally met with him even though the loan applications state on their face that they were taken by face-to-face interview.

I think that should this case gone to trial, there [p. 20] will be quite a great amount of circumstantial evidence at least that Firstier's agents knew what was happening and perhaps we might even have evidence that Firstier's agents were participants in the original scheme to create these straw sales.

Nevertheless, I don't want the Court to even consider that, but I do want to address a couple of other points. It was stated that in 1984 that IMI changed their policy provisions.

I don't believe, as we have stated in our brief, that that can be relevant to any issue. IMI has never taken the position that it is all right to defraud them. That appears to be what is being said, that it is okay if we are deceived. Well, it's not okay.

In 1984, if there was any purpose for doing that, for changing that policy, it was to clarify what had always been the policy.

Reference was made to the spot-check reviews. The spot-check reviews were testified to by Mr. Joe Pasternack who is the vice president of IMI who wrote the manual that Mr. Dawson made reference to.

Mr. Pasternack testified that he had no intent when writing that manual to allow fraud to be perpetrated on IMI. These spot-checks that are performed after the fact on about five percent of the loans are to assure quality control. [p. 21]

The loans that are the subject of the litigation today were not ever subject to that spot-check review. It is completely irrelevant. But even if it is somehow thought to be relevant, it is tantamount to saying that it's okay to defraud us. That would never be said by any insurance company and certainly wasn't the intent of Investors Mortgage Insurance in this case.

It was also stated previously that intent is always a question for the jury. Now I totally agree with that. But I also would show the Court that intent is not an issue in this case. The intent of Firstier in obtaining these mortgage insurance policies is not an issue. The issue before the Court is the interpretation of Section 3609 and its applicability to these facts.

Thank you, Your Honor.

THE COURT: Does counsel have anything further to say?

MR. DAWSON: I think we probably both have a lot more to say, but I think it would be repetitive. I don't have anything further.

THE COURT: As I said earlier, I have read and reread the pleadings, read and reread the exhibits and I have come to the conclusion that the insurance company relied on the package in making these various policies to guarantee the payment of the buyer of the property. [p. 22]

There's no question in my mind but what the package was submitted in bad faith; very, very bad faith. I don't have any trouble finding that it was submitted with dishonesty in mind to get the insurance company to pay these properties.

I find no justification for dropping the appraised value from $94,000 down to where they did.

I find that the policies should be and are cancelled as void for want of fraud, bad faith. The Court has heard no evidence in the matter of this hearing to change its mind from holding that the policies are void.

Of course in a case of this kind, the losing party has a right to appeal. If the Court happens to be wrong, I don't think I am, but if the Court happens to be wrong, it could be righted by the Circuit.

The Court does find that they relied on the package in each of these loans and the package was not honest. In fact it was dishonest. The dishonesty should and does void the policy.

Now, Mr. Gray, the Court will ask you to submit suggested findings of fact and conclusions as to each one of these loans, citing the evidence that you rely on and where it can be located. The Court will then look at what you submit as your suggestion and it is your suggestion only. The Court then will modify, add to it, delete and write its own findings of fact and conclusions of law and judgment in each of these eight policies that we have talked about. [p. 23]

How much time do you want to submit this to the Court?

MR. GRAY: Would ten days be inappropriate, Your Honor?

THE COURT: That would be all right. You may submit to Mr. Dawson a copy of it for his review. And if Mr. Dawson cares to do so, within five days you may file with the Court your objection or suggestion wherein you find that the suggestions of Mr. Gray are in error, if you care to do so.

I don't think there's any question, no question at all in my mind that this is a case where there's deliberate, willful, misleading an insurance company to guarantee the payment of these properties.

The Court had difficulty in understanding just why they suddenly and without just cause dropped the value from the $94,000 appraised value to 20 percent less; they had to to make the deal. I think that's the only reason it was done.

Is there anything else to come before the Court?

MR. DAWSON: Could I ask you to clarify for us, you made a couple of statements that the package was submitted in bad faith and submitted with dishonesty in mind.

Is it the Court's ruling – I'm not arguing with the Court at all – that that was a bad faith of Firstier or dishonesty in the mind of Firstier? [p. 24]

THE COURT: Well, it would be the bad faith of Firstier.

MR. DAWSON: Okay.

THE COURT: And the bad faith of the borrower, both of them. They worked together.

MR. DAWSON: Thank you, Your Honor, for that clarification.

MR. GRAY: May I assume that the bad faith claim, which was the other cause of action, is also moot at this point?

MR. DAWSON: I would agree with counsel that if this action is dismissed, then the bad faith action must be dismissed along with it.

I don't agree it should be, but I agree with him in his legal interpretation that with this ruling, that this ruling would force the Court to do that.

THE COURT: That will be the ruling.

Court is in recess.

CERTIFICATION

I, Lynn Hilton, Official Court Reporter, do hereby [p. 25] certify that the foregoing 24 pages constitutes a true and complete transcription of my shorthand notes as taken by me on the date set forth herein.

Dated this the 12th day of February, 1989.

/s/ _____
Lynn Hilton, CSR, RPR/CP

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

DEFENDANT'S APPLICATION FOR AWARD OF ATTORNEY'S FEES AND SUPPORTING BRIEF

Dated February 10, 1989
(Caption Omitted in Printing)

COMES NOW THE DEFENDANT, Investors Mortgage Insurance Co. ("IMI"), and pursuant to 12 O.S. §3629(B) and Local Court Rule 6(E) applies to this Court for an award of its attorney's fees incurred in this action. In support of this Application, IMI would show the Court as follows:

1. On March 18, 1987, the Plaintiff, Firstier Mortgage Co. ("Firstier") filed its Complaint in the instant action. In its March 18, 1987 Complaint, Firstier sought actual and punitive damages for IMI's alleged bad faith refusal to pay certain claims that Firstier had submitted on eight policies of private mortgage insurance underwritten by IMI.

2. On April 1, 1988, after undertaking considerable discovery, IMI moved for summary judgment on each of the eight policies of private mortgage insurance on the ground that there was no genuine issue as to any material fact and that IMI was entitled to judgment as a matter of law.

3. On January 26, 1989, after extensive briefing by the parties and after oral argument, this Court granted IMI's Motion For Summary Judgment. Consequently, IMI is the prevailing party in this action.

LEGAL ARGUMENT AND AUTHORITIES

PROPOSITION

IMI IS ENTITLED TO AN AWARD OF ITS ATTORNEY'S FEES UNDER 36 O.S. §3629(B) AS THE PREVAILING PARTY.

36 O.S. §3629(B) provides that the prevailing party in an action to recover on an insurance policy is entitled to recover its attorney's fees. Specifically, 36 O.S. §3629(B) provides, in relevant part:

> Upon a judgment rendered to either party, costs and attorney's fees shall be allowable to the prevailing party.

Section 3629(B) encompasses all types of insurance and has specifically been held to apply to suits involving private mortgage insurance policies like those that were at issue in the instant case. In a recent case from the Western District of Oklahoma, styled and numbered *Wisconsin Mortgage Assurance Corp. v. American Mortgage and Investment Co.*, No. CIV-87-1152-W (W.D. Okla. 1988) (the "AMICO case"), the Honorable Lee R. West relied on 36 O.S. §3629(B) to grant attorneys fees to an insurance company which had prevailed in a suit involving policies of private mortgage insurance. The Order granting attorney's fees in the AMICO case is attached hereto as Exhibit "A".

The United States Court of Appeals for the Tenth Circuit has stated with respect to 36 O.S. §3629(B) that "[t]he insurer is the prevailing party where the . . . insured [sic] [insurer?] rejects the claim and no judgment is awarded". *An-Son Corp. v. Holland America Ins. Co.*, 767 F.2d 700, 703 (10th Cir. 1985). IMI is clearly the prevailing party in the instant case since judgment was entered in favor of IMI as a matter of law and Firstier took nothing by way of its Complaint. Accordingly, pursuant to 36 O.S. §3629(B), IMI is entitled to an award of its attorney's fees incurred herein.[1]

---

[1] Although a formal entry of written judgment has not yet been entered by this Court, Local Court Rule 6(E) provides that an application for attorney's fees may be filed "after the judgment is rendered (by notification or announcement of a decision)."

Pursuant to Local Court Rule 6(E)(1), the Affidavit of Eric S. Gray, an attorney with Edwards, Roberts & Propester, P.C., who are the attorneys of record for IMI, is attached hereto as Exhibit "C" and incorporated herein by reference. Mr. Gray's Affidavit shows that he has personal knowledge of the services provided by Edwards, Roberts & Propester, P.C. during the course of prosecuting the instant action; that he has personal knowledge of the amount of time Edwards, Roberts & Propester, P.C. spent on this case, that he has personal knowledge of the hourly fees charged by Edwards, Roberts & Propester, P.C.; that the sum of $63,227.27 is the amount billed by Edwards, Roberts & Propester for attorney's fees and out-of-pocket expenses taxable as attorney's fees through January 26, 1989 with respect to this action; and that said sum is a reasonable fee for prosecuting this action.

The sum of $63,227.27 that IMI requests for attorney's fees represents charges for services rendered in the amount of $59,956.25 by Edwards, Roberts & Propester, P.C. and out-of-pocket expenses taxable as attorney's fees in the amount of $3,271.02 for the period from the commencement of this action through January 26, 1989. Because the fees for preparing this Application are not included and because IMI has incurred additional attorney's fees in connection with preparing the Suggested Findings of Fact and Conclusions of Law pursuant to this Court's Order at the January 26, 1989 hearing on IMI's Motion for Summary Judgment, IMI respectfully requests leave to file a Supplementary Affidavit for additional attorney's fees incurred after January 26, 1989. Additionally, pursuant to Local Court Rule 6(E) and 28 U.S.C. §1920, IMI is filing contemporaneously herewith a separate Application for Award of Costs to recover costs reasonably necessary for the prosecu-

tion of this action in the amount of $10,213.12. A copy of IMI's Application for Award of Costs is attached hereto as Exhibit "B".

WHEREFORE, IMI prays that it have and recover a judgment against Firstier for a reasonable attorney's fee in the amount of $63,227.27, costs in the amount of $10,213.12, and that IMI be granted leave to file a Supplementary Affidavit for additional attorney's fees within ten (10) days after this Court formally enters its Findings of Fact and Conclusions of Law.

Respectfully submitted,

John P. Roberts
Eric S. Gray

Of the Firm:

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ATTORNEYS FOR DEFENDANT,
INVESTORS MORTGAGE
INSURANCE CO.

. . . .

(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

BILL OF COSTS

Dated February 10, 1989

announced

Judgment having been ~~entered~~ in the above entitled action on January 26, 1989 against Firstier Mortgage Co., aka Realbanc, Inc. the clerk is requested to tax the following as costs:

Fees of the clerk	$
Fees for service of summons and complaint.....	
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	
Fees and disbursements for printing	
Fees for witnesses (itemized on reverse side). See Exhibit "A"	659.25
Fees for exemplification and copies of papers necessarily obtained for use in case. See Exhibit "B"	3,208.09
Docket fees under 28 U.S.C. § 1923.....	
Costs incident to taking of depositions. See Exhibit "C".....	6,345.78

Costs as shown on Mandate of Court of Appeals	
Other costs (Please itemize).....	
TOTAL	$10,213.12

. . . .

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

DEFENDANT'S SUPPLEMENTARY APPLICATION FOR AWARD OF ATTORNEY'S FEES AND SUPPORTING BRIEF

Dated March 15, 1989
(Caption Omitted in Printing)

1. The Defendant, Investors Mortgage Insurance Co. ("IMI"), pursuant to 12 O.S. §3629(B) and Local Court Rule 6(E), filed its initial Application for Award of Attorney's Fees and Supporting Brief on February 10, 1989 to recover a reasonable attorney's fee and costs for the period from the inception of this action until January 26, 1989. In this Supplementary Application for Award of Attorney's Fees, IMI respectfully requests that it also be awarded a reasonable attorney's fee and its costs for the period from January 27, 1989 until February 15, 1989.

2. This Supplementary Application is submitted pursuant to 36 O.S. §3629(B) and Local Court Rule 6(E). IMI expressly incorporates by reference the initial Application for Award of Attorney's Fees and Supporting Brief filed herein on February 10, 1989 and the legal arguments and authorities set forth therein.

3. Pursuant to Local Court Rule 6(E)(1), the Affidavit of Eric S. Gray, an attorney with Roberts, Gray, Goresen & Moriarty, P.C., who are the attorneys of record for IMI, is attached hereto as Exhibit "A" and incorporated herein by reference. Mr. Gray's Affidavit shows that he has personal knowledge of the attorney services provided during the course of prosecuting the instant action; that he has personal knowledge of the amount of attorney time spent on this case, that he has personal knowledge of the hourly fees charged; that the sum of $65,979.37 is the

amount billed to IMI for attorney's fees and out-of-pocket expenses taxable as attorney's fees through February 15, 1989 with respect to this action; and that said sum is a reasonable sum for services rendered in this action.

4. The sum of $65,979.37 represents charges for attorney services actually rendered and billed in the amount of $62,516.25 and out-of-pocket expenses taxable as attorney's fees in the amount of $3,463.12 for the period from the commencement of this action through February 15, 1989. The out-of-pocket expenses represent items normally itemized and billed to clients and are not normally absorbed into overhead. Thus, such items are recoverable as part of the fee award. *See, Ramos v. Lamm,* 713 F.2d 546, 559 (10th Cir. 1983).

5. The criteria for the awarding of a reasonable attorney's fee were delineated in *State ex rel. Burk v. Oklahoma City,* 598 P.2d 659, 661 (Okla. 1979) and *Oliver's Sports Center v. National Standard Ins.,* 615 P.2d 291, 295 (Okla. 1980). Pursuant to those decisions, the proper procedure for establishing a reasonable attorney's fee is to determine the hourly compensation on an hourly rate basis and then add an additional amount based on the following factors:

(a) the time and labor required;

(b) the novelty and difficulty of the questions;

(c) the skill requisite to perform the legal service properly;

(d) the preclusion of other employment by the attorney due to the acceptance of the case;

(e) the customary fee;

(f) whether the fee is fixed or contingent;

(g) time limitations imposed by the client or the circumstances;

(h) the amount involved and the results obtained;

(i) the experience, reputation and ability of the attorneys;
(j) the undesirability of the case;
(k) the relationship and length of the professional relationship with the client; and
(l) awards in similar cases.

Oliver's Sports Center, 615 P.2d at 294-95. Similar procedures for determining fee awards in federal question cases have been adopted by the Tenth Circuit. *See, Ramos v. Lamm,* 713 F.2d 546 (10th Cir. 1983).

6. IMI respectfully submits that the proper amount of attorney's fees to be awarded in its favor and against Firstier is $78,362.12, based on a total of 770.8 hours reasonably expended by various attorneys and law clerks at the hourly rates set forth in the Affidavit of Eric S. Gray attached hereto as Exhibit "A".[1] IMI also requests that it be awarded an enhancement or bonus in an amount to be determined by the Court in accordance with the guidelines discussed above for the following reasons:

a. Additional attorney's time will be needed to present IMI's Motion to Tax Costs and Fees;
b. The questions presented for resolution involved difficult legal issues with respect to how lender and borrower fraud affect an insurance company's obligation to pay on an insurance policy. Such issues had not previously been addressed in a reported decision in Oklahoma;
c. Because of the difficult legal issues, the requisite skill necessary to competently provide the legal services was heightened;
d. Representation of IMI in the instant case was made more difficult and required more time and attention to details than otherwise might be required because Firstier challenged virtually every legal and factual issue presented in this case. Counsel's efforts were obviously very successful considering that IMI's Motion for Summary Judgment was granted and Firstier's claims were dismissed, thereby giving IMI a complete and total victory.

[1] This amount includes $3,463.12 for out-of-pocket expenses that are taxable as fees. *See. Ramos v. Lamm,* 713 F.2d 546, 559 (10th Cir. 1983).

7. Additionally, pursuant to Local Court Rule 6(E) and 28 U.S.C. §1920, IMI filed contemporaneously with its February 10, 1989 Application for Award of Attorney's Fees a separate Application for Award of Costs to recover costs reasonably necessary for the prosecution of this action through January 27, 1989 in the amount of $11,343.70. To the extent that such costs are not recoverable under 28 U.S.C. §1920, IMI requests that such costs be taxed as attorney's fees pursuant to *Ramos v. Lamm,* 713 F.2d 546, 559-60 (10th Cir. 1983).

WHEREFORE, IMI prays that it have and recover a judgment against the Plaintiff, Firstier Mortgage Co., for a reasonable attorney's fee in the amount of $78,362.12, costs in the amount of $11,343.70, and a bonus in an amount to be determined by the Court.

Respectfully submitted,

JOHN P. ROBERTS
ERIC S. GRAY
GREGORY F. PILCHER
ROBERTS, GRAY, GORESEN
& MORIARTY
Suite 1340 American First Tower
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405-235-0123

ATTORNEYS FOR DEFENDANT,
INVESTORS MORTGAGE
INSURANCE CO.

(Certificate of Mailing Omitted in Printing)

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

AFFIDAVIT OF ERIC S. GRAY IN SUPPORT OF APPLICATION FOR AWARD OF ATTORNEY'S FEES

STATE OF OKLAHOMA)
) ss.
COUNTY OF OKLAHOMA)

Eric S. Gray, after being first duly sworn and upon his oath, states as follows:

1. For the time period from the commencement of this action through the date hereof, I have been an attorney of record on behalf of the Defendant, Investors Mortgage Insurance Co., in the above-captioned action. At the commencement of this action, I was an attorney with the Oklahoma City law firm of Edwards, Roberts & Propester, P.C. I am now an attorney with the Oklahoma City law firm of Roberts, Gray, Goresen & Moriarty, P.C. As an attorney of record, I have been involved on a day-to-day basis in all aspects of the preparation and litigation of this action, and I have personal knowledge of the services performed by the firms of Edwards, Roberts & Propester, P.C. and Roberts, Gray, Goresen & Moriarty, P.C., during the course of prosecuting the instant action.

2. Affiant and his firm maintain daily time records, charging all times in increments of one-

tenth of an hour. Attached hereto as Exhibit "1" and incorporated herein by reference is a Summary of Attorney's Fees, Expenses and Costs charged to Investors Mortgage Insurance Co. by Edwards, Roberts & Propester, P.C. for the billing period from April 13, 1987 until February 15, 1989. The Summary of Attorney's Fees, Expenses and Costs reflects attorney's fees, exclusive of costs, in the amount of $62,516.25 and out-of-pocket expenses taxable as attorney's fees in the amount of $3,463.12, for a total of $65,979.37.[1] I prepared the Summary of Attorney's Fees, Expenses and Costs from the daily time records and detailed billing entries attached to IMI's initial Application for Award of Attorney's fees and Supporting Brief and from the supplemental daily time records and detailed billing entries attached hereto as Exhibit "2". I have personally examined said billing entries and find them to be accurate and correct.

3. As more fully set forth in the referenced daily time records and detailed billing entries, the affiant and his firm expended a total of 770.8 hours for professional services rendered on behalf of IMI. The time spent by attorneys was as follows:

(a)	Eric S. Gray (ESG)	208.4 Hours
(b)	John P. Roberts (JPR)	75.7 Hours
(c)	Thomas P. Goresen (TPG)	18.0 Hours
(d)	Thomas P. Howell III (TPH)	1.7 Hours
(e)	Linda J. Burgess (LJB)	323.5 Hours
(f)	Gregory F. Pilcher (GFP)	127.0 Hours
(g)	Kelly W. Lewis (KWL)	3.9 Hours
(h)	Michelle Campney (MC) (Clerk)	6.0 Hours
(i)	Greg Pilcher (GP) (Clerk)	4.0 Hours
(j)	Carmen Gomez (CG) (Clerk)	8.6 Hours
	TOTAL HOURS	770.8 Hours

[1] This amount represents fees and out-of-pocket expenses taxable as fees that affiant and his firm *actually* billed to IMI. The actual fees billed are significantly less than the fees that would normally be charged by affiant and his firm for even routine matters because affiant and his firm substantially discounted the fees in the interest of client goodwill. Thus, the fees actually billed are substantially less than the reasonable fee to which IMI is entitled.

4. The charges by Affiant and his firm for routine, non-complicated matters, without consideration of size and degree of responsibility, difficulty, complexity and results achieved, is as follows:

(a)	Eric S. Gray (ESG)	$125.00/Hour
(b)	John P. Roberts (JPR)	$125.00/Hour
(c)	Thomas P. Goresen (TPG)	$125.00/Hour
(d)	Thomas P. Howell III (TPH)	$125.00/Hour
(e)	Linda J. Burgess (LJB)	$ 80.00/Hour
(f)	Gregory F. Pilcher (GFP)	$ 80.00/Hour
(g)	Kelly W. Lewis (KWL)	$ 80.00/Hour
(h)	Michelle Campney	$ 40.00/Hour
(i)	Greg Pilcher	$ 40.00/Hour
(j)	Carmen Gomez	$ 20.00/Hour

5. At the normal rates of compensation set forth above, a reasonable fee for professional services actually rendered would be determined as follows:

	Attorney	Hours	Rate	Fee
(a)	Eric S. Gray (ESG)	208.4	$125.00/Hour	$26,050.00
(b)	John P. Roberts (JPR)	75.7	$125.00/Hour	9,462.50
(c)	Thomas P. Goresen (TPG)	18.0	$125.00 Hour	2,250.00
(d)	Thomas P. Howell III (TPH)	1.7	$125.00 Hour	212.50
(e)	Linda J. Burgess (LJB)	323.5	$ 80.00/Hour	25,880.00
(f)	Gregory F. Pilcher (GFP)	127.0	$ 80.00/Hour	10,160.00

	Attorney	Hours	Rate	Fee
(g)	Kelly W. Lewis (KWL)	3.9	$80.00/Hour	312.00
(h)	Michelle Campney (MC)	6.0	$40.00/Hour	240.00
(i)	Greg Pilcher (GP)	4.0	$40.00/Hour	160.00
(j)	Carmen Gomez (CG)	8.6	$20.00/Hour	172.00
TOTAL FEES (Based on actual attorney time at normal rates)				$74,899.00

6. In addition, IMI requests reimbursement for out-of-pocket expenses taxable as attorney's fees. During the reporting period in question, affiant and his firm charged IMI $3,463.12 for such out-of-pocket expense. The out-of-pocket expenses are summarized on the Summary of Attorney's Fees, Expenses and Costs attached hereto as Exhibit "2." The out-of-pocket expenses are taxable as fees because they represent items normally itemized and billed to clients and are not absorbed into overhead. Thus, total fees and out-of-pocket expenses taxable as fees amount to $78,399.62.

7. IMI also requests a bonus based on results achieved. IMI obtained excellent results in the instant case, having achieved a complete and total victory on Motion for Summary Judgment. Under such circumstances, IMI respectfully submits that it is entitled to an enhanced fee. *See, generally, State ex rel. Burk v. Oklahoma City,* 598 P.2d 659 (Okla. 1979); *Oliver Sports Center v. National Standard Ins.,* 615 P.2d 291 (Okla. 1980); *Ramos v. Lamm,* 713 F.2d 546, 557-58 (10th Cir. 1983).

8. In my professional opinion, the sum of $78,362.12 constitutes a fair and reasonable award of

attorney's fees and litigation expenses to be taxed against the Plaintiff, Firstier Mortgage Co.

FURTHER, THE AFFIANT SAIETH NOT.

ERIC S. GRAY

. . . .

(Acknowledgement Omitted in Printing)

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-87-564-B

FIRSTIER MORTGAGE CO., a/k/a REALBANC, INC.,
Plaintiff,

v.

INVESTORS MORTGAGE INSURANCE CO.,
Defendant.

SUMMARY OF ATTORNEY'S FEES, EXPENSES AND COSTS

ATTORNEY FEES (per attached billing summary):		$62,516.25
OUT-OF-POCKET EXPENSES TAXABLE AS ATTORNEY'S FEES (per attached billing summary):		
Express Mail	$ 303.00	
Postage	85.89	
Long Distance Telephone Charges	214.94	
Travel expenses for out-of-state depositions	1,374.48	
Computerized legal research	1,408.01	
Taxi fares	76.80	
		3,463.12
TOTAL ATTORNEY FEES AND OUT-OF-POCKET EXPENSES TAXABLE AS ATTORNEY FEES		65,979.37
COSTS TAXABLE PURSUANT TO 28 U.S.C. §1920 (see Bill of Costs):		11,343.70
TOTAL FEES AND COSTS		$77,323.07

Edwards, Roberts & Propester P.C.
Suite 2900, First Oklahoma Tower
210 West Park Avenue
Oklahoma City, Oklahoma 73102-5605
(405) 239-2121 EI# 73-1155781

February 3, 1989

Billed through 01/31/89

Bill number 366117-40087-030 ESG

Investors Mortgage Insurance Company
P.O. Box 570
Boston, MA 02102
Attn: Barbara Joy

Balance forward as of bill number 024 dated 01/09/89	$2,913.70
Payments received since last bill (last payment 01/30/89)	$2,913.70
Net balance forward	$ .00

First Tier Mortgage Co.
IMI Policy No. 457224
Borrower: Charles Wolfes
Lender Loan: 204253

FOR PROFESSIONAL SERVICES RENDERED

01/09/89	GFP	Reviewed files to determine status of case; summarized deposition of Robert Gondring.	4.60 hrs. 80/hr.	368.00
01/20/89	GFP	Discussed hearing on Motion for Summary Jugment with Eric Gray and preapred Briefs for review and preparation of oral argument.	.30 hrs. 80/hr.	24.00

01/23/89	GFP	Reviewed pleadings to prepare for hearing on IMI's Motion for Summary Judgment.	1.00 hrs. 80/hr.	80.00
01/24/89	GFP	Legal research regarding ability to draw adverse inferences from a witness who takes the fifth amendment; legal research regarding 36 O.S. Section 3609; preparation for hearing on IMI's Motion for Summary Judgment; legal research re agency.	3.50 hrs. 80/hr.	280.00
01/25/89	GFP	Westlaw legal research on agency issues; legal research on agency issue and on 36 O.S. Section 3609; documents necessary for hearing on Motion for Summary Judgment; prepared for hearing on Motion for Summary Judgment; reviewed depositions, documentary evidence and Affidavit.	4.60 hrs. 80/hr.	368.00
01/26/89	ESG	Prepare for hearing on Motion.	6.00 hrs. 125/hr.	750.00
01/26/89	ESG	Prepare for and argue Motion for Summary Judgment.	4.00 hrs. 125/hr.	500.00

01/26/89	GFP	Reviewed case law cited in Briefs and prepared for hearing on Motion for Summary Judgment with Erig Gray; legal research re whether attorney fees are recoverable by prevailing party and on time to file Application to Tax Costs and Fees; reviewed court files in AMICO case at Federal Courthouse for authority on attorney's fees issues.	4.30 hrs. 80/hr.	344.00
01/27/89	GFP	Reviewed fee workup to verfiy completeness and accuracy; continued legal research re recovery of attorney's fees under 36 O.S. Section 3629; reviewed default packages to assure that IMI's letters denying coverage were delivered within 90 days of date First Tier filed claims; drafted Motion for Award of Attorney's Fees and Affidavit of Erig Gray; Shepardized cases; reviewed Local Court Rules to assure compliance; reviewed and edited Motion and Affidavit.	3.60 hrs. 80/hr.	288.00

01/30/89	GFP	Began preparing Bill of Costs to be taxed by clerk; reviewed Judge West's Order granting attorney's fees in AMICO case and revised our Motion for Attorney's Fees accordingly. 1.50 hrs. 80/hr.	120.00
01/31/89	GFP	Drafted proposed findings of fact; legal research regarding 28 O.S. Section 1920 and what may be taxed as costs. 3.50 hrs. 80/hr.	280.00
		Total fees for this matter	$3,402.00

DISBURSEMENTS

01/27/89	Miscellaneous Expense — Westlaw usage	200.00
01/31/89	Photocopy Expense	41.00
01/31/89	Outside Photocopy Expense	5.90
01/31/89	Express Delivery Charges	15.00
	Total disbursements for this matter	$261.90

BILLING SUMMARY

Gray, Eric S.	10.00 hrs. 125/hr	1,250.00
Pilcher, Gregory F.	26.90 hrs. 80/hr.	2,152.00
TOTAL FEES	36.90 hrs.	$3,402.00
TOTAL DISBURSEMENTS		$ 261.90
TOTAL CHARGES FOR THIS BILL		$3,663.90
TOTAL BALANCE NOW DUE		$3,663.90

CLIENT 366117 Investors Mortgage Ins. Co.
MATTER 40087 First Tier Mortgage Co.

02/01/89	GFP	Reviewed billing summary and itemization of costs for reasonableness and accuracy; Drafted Bill of Costs and Exhibits detailing various cost categories; Reviewed and Revised Findings of Fact 6.00 hrs. 80/hr.	480.00
02/01/89	GFP	Reviewed letter from client re publishing Court's Order; Revised and edited Findings of Fact; Drafted Conclusions of Law 5.60 hrs. 80/hr.	448.00
02/03/89	GFP	Reviewed Findings of Fact and Conclusions of Law and revised as necessary; Drafted transmittal letter to client. 2.20 hrs. 80/hr.	176.00
02/06/89	GFP	Legal research re requirements for publishing district court decision; Shepardize cases cited in Conclusions of Law; Final revisions to findings of fact and conclusions of law; Transmittal letter to Judge L. Bohanon 1.4 hrs. 80/hr.	112.00

02/07/89	GFP	Discussed procedure for publishing decisions with court clerk; drafted letters to Judge Bohanon requesting publication; Drafted letter to client explaining publication requirements. .8 hrs. 80/hr.	64.00
02/10/89	GFP	Reviewed Application for Attorney's Fees; Drafted Summary of Fees and Costs; Drafted Affidavit in Support of Bill of Costs; Prepared exhibits for filing; Filed Application for Award of Fees; Filed Bill of Costs and docketed Appearance Date 3.00 hrs. 80/hr.	240.00
02/13/89	GFP	Drafted Supplemental Motion for Attorney's Fees; Drafted Supplemental Bill of Costs; Reviewed Preliminary Record on Appeal prepared by Court Clerk; Reviewed Fed. R. App. Proc. to determine time requirements for designation of record, ordering transcripts, filing briefs, etc. 3.00 hrs. 80/hr.	240.00

02/14/89	GFP	Reviewed Firstier's Objections to Suggested Findings of Fact and Reviewed Firstier's Findings of Fact; Reviewed and Revised Supplemental Applications for Attorney's Fees and Bill of Costs 1.40 hrs. 80/hr.	112.00

Edwards, Roberts & Propester, P.C.

CLIENT/MATTER INQUIRY

CLIENT 366117 Investors Mortgage Ins. Co.
MATTER 40087 First Tier Mortgage Co.

DATE	CODE	AMOUNT	DESCRIPTION
02/01/89	27	5.00	Express Delivery Charges
02/03/89	05	22.00	Express Mail Expense
02/06/89	26	40.85	Miscellaneous Expense — legal research on Westlaw
02/07/89	27	10.00	Express Delivery Charges
02/10/89	27	5.00	Express Delivery Charges
2/13/89	01	163.80	Photocopy Expense
TOTAL EXPENSE		340.40	

Edwards, Roberts & Propester, P.C.

CLIENT/MATTER INQUIRY

CLIENT 366117 Investors Mortgage Ins. Co.
MATTER 40087 First Tier Mortgage Co.

DATE	CODE	AMOUNT	DESCRIPTION
02/15/89	13	93.75	Court Reporter Fees — copy of transcript

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

NOTICE OF APPEAL
Dated February 8, 1989
(Caption Omitted in Printing)

Notice is hereby given that Plaintiff, Firstier Mortgage Co., hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Judge's ruling announced by the Court in this action on the 26th day of January, 1989, but not yet entered on its judgment docket. F.R.A.P. 4(a)(2).

JANICE M. DANSBY and
JACK S. DAWSON -of-
Miller, Dollarhide, Dawson and Shaw
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

ATTORNEYS FOR PLAINTIFF

. . . .

(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

APPLICATION FOR EXTENSION OF TIME
TO FILE NOTICE OF APPEAL
Dated April 14, 1989
(Caption Omitted in Printing)

Pursuant to Federal Rule of Appellate Procedure ("F.R.A.P.") 4(a)(5), FirsTier Mortgage Co. requests that this Court grant an extension of time to file a Notice of Appeal from the Court's Order and Judgment entered on March 3, 1989, for the following reasons:

1. We believe that the Court announced a final decision when it advised the parties on January 26, 1989 that it would sustain Defendant's Motion for Summary Judgment. Pursuant to F.R.A.P. 4(a)(2), we filed FirsTier's Notice of Appeal from the court's announcement of its decision on February 8, 1989. The Court entered its Order and Judgment on March 3, 1989. F.R.A.P. 4(a)(2) provides that the Notice of Appeal would be treated as if filed immediately after the Court entered its Order and Judgment memorializing its bench announcement. F.R.A.P. 4(a)(2); *Acosta v. Louisiana Department of Health and Human Resources,* 106 S.Ct. 2876 (1986); *Stevenson v. Grentec, Inc.,* 652 F.2d 20 (9th Cir. 1981).

2. We have recently learned that the Court of Appeals may be uncertain as to whether this Court made a final decision, in which it disposed of all the issues as to all the parties, when it made its announcement on January 26, 1989. We believe that the Court's decision was final on that date. However, if our understanding of the Court's intent was in error, the error was excusable. Our notice of appeal, if we were in error, would have been due on April 3, 1989.

3. Federal Rule of Appellate Procedure 4(a)(5) provides that the district court may grant an extension of time for filing a notice of appeal during the

period between 30 and 60 days following the entry of a final order based upon a showing of excusable neglect. Cases construing the rule say that counsel's good faith, though erroneous interpretation of the law, may be excusable neglect. *Feeder Tow Line Service, Inc. v. Toledo, P. & W.R.R. Co.*, 539 F.2d 1107, 1109 (7th Cir. 1976).

4. FirsTier requests that this Court grant it an extension of time until May 2, 1989 in which to file a Notice of Appeal from the Order and Judgment entered on March 3, 1989. FirsTier believes that such an extension will be an aid to the Court of Appeals because it will address a procedural question and allow FirsTier to preserve its valuable right to appeal.

5. Counsel for Defendant objects to the requested extension.

JACK S. DAWSON #2235
JANICE M. DANSBY -of- #2155
Miller, Dollarhide, Dawson & Shaw
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

ATTORNEYS FOR PLAINTIFF,
FIRSTIER MORTGAGE CO.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

ORDER
Dated April 24, 1989
(Caption Omitted in Printing)

NOW, on this 24th day of April, 1989, upon consideration of Plaintiff's Application for Extension of Time;

IT IS HEREBY ORDERED that Plaintiff, FirsTier Mortgage Co., be granted an extension of time from April 3, 1989 to May 1, 1989 in which to file its Notice of Appeal.

/s/ _____
LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

APPROVED BY:

JACK S. DAWSON #2235
JANICE M. DANSBY -of- #2155
Miller, Dollarhide, Dawson & Shaw
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

ATTORNEYS FOR PLAINTIFF,
FIRSTIER MORTGAGE CO.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

NOTICE OF APPEAL
Dated April 25, 1989
(Caption Omitted in Printing)

Notice is hereby given that Plaintiff, FirsTier Mortgage Co., hereby appeals to the United States Court of Appeals for the Tenth Circuit from the Court's Order and Judgment and Memorandum Opinion entered in this action on March 3, 1989.

JANICE M. DANSBY -of- #2155
Miller, Dollarhide, Dawson & Shaw
1200 Colcord Building
Oklahoma City, Oklahoma 73102
(405) 236-8541

ATTORNEYS FOR PLAINTIFF,
FIRSTIER MORTGAGE CO.

. . . .

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